No. 98-629

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

TOWN OF NEWBURGH, NY; CHARLES M. KEHOE, Chief of Police, Town of Newburgh Police Department,

Petitioners,

vs.

JOSEPH H. HOLZAPFEL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a claim for unpaid overtime under the Fair Labor Standards Act, when an employer has failed to keep record of all hours worked by its employees as required by the Act, is an employee entitled to be paid based on the actual amount of time performing work or only for some amount of time considered "reasonable" by the finder of facts?

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STATEMENT OF THE CASE

Petitioners seek to undermine long-established principles under the Fair Labor Standard Act that require an employer to pay its employees for all work "suffered or permitted" by the employer and not only for a "reasonable" amount of work determined after the fact. As detailed below there is no reason for the Court to review the decision of the Court of Appeals which correctly applied the long-established principles to the facts of this case. Contrary to petitioners' contention, there is no conflict in the circuits.

A. Factual Background

Plaintiff, Joseph Holzapfel, was a police dog handler for the police department of defendant Town of Newburgh. In his suit under the Fair Labor Standards Act ("the FLSA" or "the Act"), plaintiff claims that he performed "off the clock" overtime work with respect to his duties as a K-9 officer for the Town for which he was not compensated at time and one half his regular rate as required by the Act.

The only facts relevant to this petition relate to the "off the clock" time plaintiff spent caring for, maintaining and training his assigned dog "Bandit." The Court is respectfully referred to the concise statement of facts on this issue set forth in the opinion of the Court of Appeals. Appendix 3a-5a.[1] Petitioners' factual statement distorts some facts and omits others.

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[1] References are to the Appendix to the petition.

Of particular significance are the following two paragraphs from the opinion below, Appendix 4a-5a, omitted from petitioners' recitation of facts:

> As a standard policy, the Town of Newburgh paid K-9 officers two hours of overtime each week. Pursuant to instructions, plaintiff filled out the weekly overtime slip in advance, rather than calculate the actual off-duty hours spent with Bandit after they occurred. Although Officer Holzapfel was told that he would be paid for only two overtime hours per week, he was never directed to limit his off-duty activities to those two hours for which he was compensated.
>
> Various members of the police department, including Chief Kehoe, were aware that K-9 officers assumed additional duties. Estimates as to the time involved varied among the trial witnesses. Chief Kehoe acknowledged that the responsibilities – exclusive of training – could add up to at least one hour per day. He was also aware that K-9 officers, including plaintiff, engaged in off-duty training, but did not know how much extra time these officers spent off-duty with their dogs.

The evidence therefore established that the plaintiff, Officer Holzapfel, was "suffered or permitted" to perform uncompensated "off the clock" work caring for, maintaining and training his assigned police dog.

B. Proceedings Below

Prior to trial, the district court had correctly determined, following well established precedent, that "a K-9

officer must be compensated for the off-duty time that he spends performing the tasks involved in caring for and training his assigned police dog, unless the time devoted to a particular task is *de minimis*." Appendix 59a. The primary issue at trial was how much uncompensated overtime plaintiff spent performing these tasks.

At the trial, rather than defining the activities that constituted compensable work and requesting the jury to determine how much time plaintiff had engaged in this work "off the clock," the district court formulated a verdict question and jury instructions that required the jury to limit the amount of work for which plaintiff could recover by two conditions. Petitioners neglect to quote the verdict question. It appears at Appendix 6a:

> Has the plaintiff Joseph H. Holzapfel proved by preponderance of the credible evidence that he spent additional time, over and above the 40 hours of regular time and 2 hours of overtime for which he was compensated, in performing work which was (1) *reasonably necessary* to fulfill his duties of feeding, grooming, caring for and training the K-9 unit dog assigned to him and (2) which could not *reasonably be performed* within such 42 hours of compensated time per week. (Emphasis in original).

The district court also gave the jury the instructions quoted by petitioners on pages 3-4 of the petition.

The Court of Appeals determined that the verdict question and instructions were reversible error. With respect to the first "condition" of the verdict question, the Court of Appeals held that employees are to be paid for their "work" and that the jury should have been

instructed on the definition of "work" under the law, which contains no limitation based on the reasonable necessity of the work.

With respect to the second "condition" of the verdict question – which the district court, in its decision denying plaintiff's post-trial motion, justified on the grounds that it addressed the employer's constructive knowledge of plaintiff's off the clock work – the Court of Appeals held that "more than one way exists to show constructive knowledge, and it is not exclusively dependent on whether assigned duties could reasonably be performed in an allotted number of hours." Appendix 17a-18a. Therefore, the Court determined that the verdict question and instruction were "too limited," Appendix 18a, and that the jury might have reached a different result had appropriate instructions been given.

The Court of Appeals affirmed the district court's second verdict question, which is unrelated to the issue presented by the petition.

REASONS FOR DENYING THE WRIT

The decision below was a correct application of settled law and no conflict among the circuits exists.[2]

[2] Petitioners seek review of the decision below only with respect to the first condition of verdict question 1. The petition does not address the reversal by the Court of Appeals based on the error of the second condition in the verdict question relating to the constructive knowledge of the employer.

The Fair Labor Standards Act requires that employers pay employees time and one-half their regular rate for all "work" done over 40 hours per week. Employees are to be paid for all work that is "suffered or permitted" by their employer.[3] 29 C.F.R. § 785.11.[4] When an employer "knows or has reason to believe" that work is being done, the employer is obligated to count the time as work time. *Id.*

It is the employer's obligation under the Act to keep accurate records of the hours worked by its employees. 29 U.S.C. § 211(c); 29 C.F.R. § 516.2. In the absence of such records, an employee may recover unpaid overtime based on estimates of the hours worked and the employer may not complain about the inexactness of the result. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946).

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[3] The requirement of overtime pay for hours over 40 in a workweek is set forth in 29-U.S.C § 207(a)(1) which provides that an employer shall not "employ" an employee for a workweek longer than forty hours without paying for the hours over 40 at time and a half the regular rate. Title 29 U.S.C. § 203(g) provides that " 'employ' includes to suffer or permit to work."

[4] 29 C.F.R. § 785.11 provides:

> Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task, or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time. [citations omitted].

A. Employees are entitled to be paid for all overtime work suffered or permitted and not just some "reasonable" amount of work.

Under long-established law employees are entitled to be paid based on all the work they perform, not just for a "reasonable" amount of work. An employer may not avoid wage liabilities for uncompensated overtime work on the grounds that the work was not "reasonable" or not "reasonably necessary." An activity is either work or it is not. If it is, the employer is obligated to pay wages based on "all" work suffered or permitted. 29 C.F.R. §§ 778.223, 778.315, 785.11; *see, e.g., Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) ("To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of the [Act]."); *Donovan v. United States Postal Service*, 25 Wage & Hour Cas. (BNA) 58, 92 Lab. Cas. (CCH) ¶34,124, 1981 U.S. Dist. LEXIS 17145 at *45-46 (D.D.C. 1981) ("The policies underlying the FLSA do not permit an employee [*sic*; should be "employer"] to unilaterally decide how much time is reasonably spent by an employee at a given task while permitting the employee to continue at that activity. Rather, the policies underlying the FLSA support one provision – employees must be paid for work suffered or permitted by their employer."); *Adams v. United States*, 36 Fed. Cl. 91, 95 (1996) (compensation required for "all time during which an employee is suffered or permitted to work whether or not he is required to do so."). The issue under the FLSA is the "amount of time spent," not the amount of time that "could have been spent" under different circumstances.

See, e.g., Skipper v. Superior Dairies, Inc., 512 F.2d 409, 418 (5th Cir. 1975) (Because another employee could or did perform same duties in less time is not a reason plaintiff is to be paid less than the "hours actually worked by him."); *Donovan v. Kentwood Development, Inc.*, 549 F.Supp. 480, 488 (D. Md. 1982) ("It is immaterial whether it was necessary for [the employee] to work long hours, so long as he did, with the actual or constructive knowledge of his employer."); *Hodgson v. Rancourt*, 336 F.Supp. 1119, 1123-24 (D.R.I. 1972) (mere generalization as to what other employees might possibly be able to do not sufficient to rebut employee's evidence of hours worked).[5]

This rule is fundamental to FLSA jurisprudence. Any other rule would result in employees being "allowed" to perform work without compensation. *Tony and Susan Alamo Foundation v. Sec. Labor*, 471 U.S. 290, 302 (1985). The rule in no way restricts an employer from avoiding overtime liabilities, nor does it in any way imply that employees have a "blank check" to obtain wages an

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[5] Other cases confirming that employees are entitled to compensation for the "actual time" worked include: *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946) (employees to be paid for hours "actually worked"); *Reich v. New York City Transit Authority*, 45 F.3d 646, 651-652 (2d Cir. 1995) ("actual duties" of care, feeding, training, walking or cleaning up after police dog during commute is compensable work); *Reich v. Waldbaum*, 833 F.Supp. 1037, 1044 (S.D.N.Y. 1993), *rev'd on other grounds*, 52 F.3d 35 (2d Cir. 1995); *Bledsoe v. Wirtz*, 384 F.2d 767, 771 (10th Cir. 1967) ("amount of time spent"); *Treece v. Little Rock*, 923 F.Supp. 1122 (E.D. Ark. 1996) (trial issue was "actual time" spent performing compensable activities); *Truslow v. Spotsylvania County Sheriff*, 783 F.Supp. 274, 279 (E.D. Va. 1992), *aff'd*, 993 F.2d 1539 (4th Cir. 1993) (unpublished).

employer may not wish to incur. It merely means that the employer's ability (and responsibility) to control and restrict the work of employees is at the "front end," not the "back end." *See Donovan v. United States Postal Service*, 25 Wage & Hour Cas. (BNA) 58, 92 Lab. Cas. (CCH) ¶34,124 (D.D.C. 1981). Contrary to the suggestion by petitioners (petition at 6), the ability of the employer to "directly supervise" the employee is irrelevant to the employer's obligation to pay for all work. The rule applies to work away from the work site and even at home. 29 C.F.R. § 785.12;[6] 29 C.F.R. § 785.13.[7]

An employer may certainly restrict the amount of work performed by an employee, or require that work not be performed during off the clock time. If an employer believes an employee is inefficient, it may of course require the employee to "work faster," or provide additional training or supervision, or even discipline or fire the employee. *See Clark v. Atlanta Newspapers*, 366 F.Supp. 886, 896 n. 16 (N.D. Ga. 1973). Employers have a

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[6] 29 C.F.R. § 785.12 provides:

> The rule is also applicable to work performed away from the premises or job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.

[7] 29 C.F.R. § 785.13 provides:

> In all cases it is the duty of management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

"duty to inquire" about whether their employees are performing compensable work, and an employee's failure to report hours worked is no defense in an FLSA case. *Reich v. Dept. of Conservation and Natural Resources, State of Alabama*, 28 F.3d 1076, 1082 (11th Cir. 1994), citing *Gulf King Shrimp v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969); *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959). What an employer may not do is suffer or permit an employee to perform work and not pay for all the work performed.

Thus, the Court below correctly determined that verdict question 1 and instructions were plainly in error to the extent they limited plaintiff only to time worked that was "reasonably necessary."

B. There is no conflict in the Circuit Courts

There is no conflict in the circuit courts justifying the granting of the Writ. The Court below correctly limited the holdings of the cases relied on by petitioners to their facts. Appendix 18a-19a. The cases certainly do not stand for the general proposition urged by petitioners that employees are only to be paid for a "reasonable" amount of time rather than for all work suffered or permitted.

In the case of *Reich v. IBP, Inc.*, 820 F.Supp. 1315, 1324 (D. Kan. 1993), *aff'd and remanded*, 38 F.3d 1123 (10th Cir. 1994), *on remand*, 3 Wage & Hour Cas.2d (BNA) 324, 1996 U.S. Dist. LEXIS 3709, the employees had not been paid for off the clock time spent "putting on, cleaning, and taking off . . . unique personal protective gear." 38 F.3d at 1127. The difficulty was that these compensable (but

uncompensated) activities were "intermingled" with a variety of non-compensable activities which had occurred during the same period. *See* 3 Wage & Hour Cas.2d 324, 1996 U.S. Dist. LEXIS 3709, at *12 n. 4. The compensable time itself was, of course, the actual time spent by the employees performing compensable work. However, the difficult task was to separate the compensable portion of the time spent from the noncompensable portion. The district court did so by estimating a "reasonable time" for the employees to have performed the compensable activities. Thus, the court's "reasonable time" language described a methodology for estimating the actual, compensable time involved. The Tenth Circuit upheld this methodology "in this case." 38 F.3d at 1127.

Amos v. United States, 13 Cl. Ct. 442 (1987), involved the similar question of how much time was involved in employees traveling to and from a control room at a prison to obtain equipment needed for their duties. The *Amos* court decided to award the employees under these circumstances a "reasonable time" for these activities, commenting that otherwise some employees could be rewarded for "lack of diligence in getting and returning the equipment and in walking to and from this work station and, conversely, penalizing those of the plaintiffs who may have taken less than reasonable amount of time doing these activities." 13 Cl. Ct. at 450. Petitioners rely heavily on this language. However, the *Amos* court got the law "backwards." It is the *employer's* "lack of diligence" which the FLSA does not permit to be "rewarded." It is up to the *employer*, not the employee, to "control" the work. 29 C.F.R. § 785.13. The *Amos*'s court's

notion that those employees spending less than a reasonable time to perform an activity should not be "penalized" for being efficient and should be paid for more time than they actually worked is completely foreign to the statutory language and established FLSA law. *Amos* in effect rewrites and revolutionizes the FLSA, changing it from a statute intended to spread employment by requiring wages based on all hours worked, to one intended to encourage worker productivity by requiring payment only for "reasonable time." Of course, Congress intended no such result.

CONCLUSION

The Court of Appeals correctly applied established law to the facts of this case. There is no need or basis for this Court to review the Second Circuit's decision. The petition should be denied.

Dated: November 12, 1998

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